9 FAM 40.1 Notes

(TL:VISA-307; 08-20-2001)

9 FAM 40.1 N1 Validity of "Marriage" for Immigration Purposes

9 FAM 40.1 N1.1 Marriage and Spouse Defined

(TL:VISA-162; 02-24-1997)

Sec. 7 of the Defense of Marriage Act (Pub. L. 104-199) states: "The word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." While the term "marriage" is not defined in the INA, it can be extrapolated from the language found in the definition of spouse, INA 101(a)(35). A marriage, in order to be valid for immigration purposes, must be celebrated in the presence of both parties, unless the marriage has been consummated. The underlying principle in determining the validity of the marriage is that the law of the place of marriage celebration controls. If the law is complied with, and the marriage is recognized, and the termination of a prior marriage, if any, is recognized, then the marriage is deemed to be valid for immigration purposes.

9 FAM 40.1 N1.2 Cohabitation

(TL:VISA-307; 08-20-2001)

In the absence of a marriage certificate, an official verification, or a legal brief verifying full marital rights, the Board of Immigration Appeals has established that a common law marriage or cohabitation is considered to be a "valid marriage" for purposes of administering the U.S. immigration law, provided:

(1) it bestows all of the same legal rights and duties possessed by partners in a lawfully contracted marriage; and

(2) such cohabitation is recognized by local laws as being fully equivalent in every respect to a traditional legal marriage, i.e.,

(a) the relationship can only be terminated by divorce;

(b) there is a potential right to alimony;

(c) there is a right to intestate distribution of an estate; or

(d) there is a right of custody, if there are children.

9 FAM 40.1 N1.3 Proxy Marriage

9 FAM 40.1 N1.3-1 Consummated

(TL:VISA-128; 10-20-1995)

For the purpose of bestowing immigrant visa status on a “spouse”, a proxy marriage which has been consummated is deemed to have been valid as of the date of the proxy ceremony.

9 FAM 40.1 N1.3-2 Unconsummated

(TL:VISA-128; 10-20-1995)

A proxy marriage, if not subsequently consummated, does not create or confer the status of “spouse” for immigration purposes pursuant to INA 101(a)(35). Therefore, a party to an unconsummated proxy marriage may be processed as a nonimmigrant fiance(e). A proxy marriage celebrated in a jurisdiction recognizing such marriage is generally considered to be valid, thus, an actual marriage in the United States is not necessary if such alien is admitted to the United States under INA provisions other than as a spouse.

9 FAM 40.1 N1.4 Japanese or Korean Marriages

(TL:VISA-41; 01-15-1991)

An alien is a "spouse" within the meaning of INA 101(a)(35) if the marriage was lawfully entered into pursuant to the laws of Japan or the Republic of Korea through the filing of the required notification with the Ward Registrar and the parties:

(1) Were physically present together at the time of such filing, or

(2) Consummated the marriage after such filing, or

(3) Had previously participated in a religious or private marriage ceremony and thereafter cohabited as man and wife.

9 FAM 40.1 N1.5 Uncle-Niece and First-Cousin Marriages

(TL:VISA-128; 10-20-1995)

a. The determination of the status of a "spouse" in an uncle-niece or first-cousin marriage involves three variables:

(1) Laws of the place where the marriage took place,

(2) Laws of the state of proposed residence in the United States, and

(3) Facts which vary in individual cases.

b. Where the consular officer is faced with determining the validity of such a marriage for consular approval of a petition, the case must be considered "not clearly approvable" [see 9 FAM 42.41 N2.4] and submitted for to INS for approval.

c. In cases where the INS has approved a petition involving such a marriage, and the consular officer questions its validity, but does not believe it necessary to return the petition directly to INS pursuant to 22 CFR 42.43, then, the consular officer shall refer any questions concerning the validity of the petition to CA/VO/L/A for an advisory opinion.

9 FAM 40.1 N1.6 Legal Separation Versus Marriage Termination

(TL:VISA-128; 08-20-1995)

a. An alien is deemed a "spouse" for immigration purposes, even though the parties to the marriage have ceased cohabiting, as long as such marriage was not contracted solely to qualify for immigration benefits. If the parties, however, are legally separated, i.e., by written agreement recognized by a court, or by court order, the alien no longer qualifies as a "spouse" for immigration purposes even through the couple has not obtained a final divorce [See Matter of McKee 17 I&N 332 and Matter of Zenning 17 I&N 2816.]

b. Conversely, in a case where the parties' prior marriage has been terminated by a legal separation which is not recognized by the state in which they reside, such parties must first obtain a divorce from the prior spouse in order to qualify for an immigrant visa.

9 FAM 40.1 N2 Child Defined

(TL:VISA-307; 08-20-2001)

The term "child" refers to an unmarried person under 21 years of age. This note addresses the many categories of the term "child" under the provisions of INA 101(b)(1) with the exception of 101(b)(1)(*G*).

9 FAM 40.1 N2.1 Legitimate Child

(TL:VISA-41; 01-15-1991)

A child may qualify as a legitimate child under the provisions of INA 101(b)(1)(A) if the law of the child's country of birth or the law of the parent's place of residence has deemed such child to be a "legitimate" child. For instance, the Board of Immigration Appeals has held that under Chinese law, acknowledgment by the natural father of the child of a Chinese concubine may confer legitimation upon such child, provided the child has resided in the same household with the father. Thus, the child of a concubine may be considered to be the legitimate child of the father pursuant to the provisions of INA 101(b)(1)(A).

9 FAM 40.1 N2.2 Stepchild Relationship Under INA 101(b)(1)(B)

(TL:VISA-128; 10-20-95)

The provisions of INA 101(b)(1)(B) provide for the creation of a step-relationship between the natural offspring (whether or not born out of wedlock) of a parent and that parent's spouse. Such step relationship is created upon the marriage of the offspring's natural parent to a spouse and must be based on a marriage which is or was valid for all purposes, including immigration purposes. The offspring:

(1) Must be or have been under the age of 18 at the time the marriage takes place in order to acquire the benefits as a child under INA 101(b)(1)(B). No previous meeting of the offspring and the new parent is required, nor is there any requirement that an emotional relationship exist; and

(2) Continues to be entitled to immigration benefits from such marriage, even though the relationship between the natural parent and the stepparent was terminated at a later date, provided the marriage was a valid marriage and the family relationship continued to exist as a matter of fact between the stepparent and stepchild.

9 FAM 40.1 N2.3 Legitimation of Child

9 FAM 40.1 N2.3-1 Qualification of Child Under INA 101(b)(1)(C)

(TL:VISA-41; 01-15-1991)

In order for a child to qualify under the provisions of INA 101(b)(1)(C) the child must meet the following criteria:

(1) Legitimation by the natural father must occur in accordance with the law of the child's residence or domicile or in accordance with the law of the father's residence or domicile, whether in or outside of the United States;

(2) The father must establish that he is the child's natural father;

(3) The child must be under the age of 18; and

(4) The child must have been in the legal custody of the legitimating parent at the time the legitimation takes place. For adoption purposes legal custody may be granted prior to the issuance of a decree. [See 9 FAM 40.1 N2.4 below.].

9 FAM 40.1 N2.3-2 Qualification of Child Under INA 101(b)(1)(D) Through Mother

(TL:VISA-41; 01-15-1991)

A child born out of wedlock, by virtue of his or her relationship to the natural mother, is deemed to be the legitimated "child" of the natural mother under INA 101(b)(1)(D). The natural mother's name on the child*'s* birth certificate may be taken as proof of such relationship.

9 FAM 40.1 N2.3-3 Qualification of Child Under INA 101(b)(1)(D) Through Father

(TL:VISA-41; 01-15-1991)

a. An illegitimate offspring of the natural father is deemed to be a "child" within the meaning of INA 101(b)(1)(D), provided the father has or has had a *bona-fide* parent-child relationship with his offspring. While an ongoing father-child relationship is not required to establish a *bona fide* parent-child" relationship, the consular officer must ascertain whether a genuine parent-child relationship, not merely a tie by blood, exists or has existed at some point prior to the offspring's twenty-first birthday.

b. While each case must be determined based on the facts presented, the consular officer must be satisfied that the facts demonstrate the existence of a past or present parent-child relationship. For instance, although not necessary, the moral or emotional behavior of the father and/or child toward each other which reflects the existence of such a relationship may constitute favorable evidence of the relationship, just as cohabitation may be another element of evidence of such relationship.

c. Proof of present or former familial relationship may include the:

(1) Father's acknowledgment within the community that the child is his own;

(2) Father's support for the child's needs;

(3) Father's genuine concern for and interest in the child; and

(4) Parent-child relationship was established while the child was unmarried and under the age of 21.

9 FAM 40.1 N2.4 Adoption

9 FAM 40.1 N2.4-1 Qualification of Adopted Child Under INA 101(b)(1)(E)

(TL:VISA-185; 02-26-1999)

a. In order to qualify as an adopted child under INA *101*(b)(1)(E) a child must have been:

(1) Legall*y* adopted while under the age of 16; and

(2) In legal custody of, and have resided with, the adoptive parents for at least two years.

b. The legal custody requirement may be fulfilled either prior to or after the child's adoption. Legal custody is deemed official at the time the adopting parents are awarded custody of the child rather than on the date the adoption becomes final. If custody did not exist prior to adoption, a certified copy of the adoption decree constitutes proof of the custody requirement at least from the date on which it was issued.

c. The period of residence for which the adoptive parents and child have lived together must be at least *two* years, prior to or after the adoption. Furthermore, the time frame in which the two years are accrued need not be continuous. In addition, the petitioning adoptive parents must establish that they have exercised primary parental control during the period in which they seek to establish compliance with the statutory two-year residence requirement. Evidence of such control, especially in cases where the adopted child resided or continues to reside in the same household with the natural parents, may include competent objective evidence that the adoptive parents have provided or are providing financial support and day-to-day care, and have assumed the responsibility for important decisions in the child's life.

d. A child adopted under the provisions of INA 101(b)(1)(E) is precluded from bestowing any benefit or privilege or status to the natural parents because of such parentage. [See 9 FAM 40.1 N4 below.]

9 FAM 40.1 N2.4-2 Adopted Child of Single Person

(TL:VISA-41; 01-15-1991)

A child legally adopted by a single person may be considered a "child" within the meaning of INA 101(b)(1)(E), provided the adoptive parent is over the age of twenty-five and custody and residence requirements of that section have been met. [See 9 FAM 40.1 N6 below.]

9 FAM 40.1 N2.4-3 Illegitimate Child of Natural Father Pursuant to INA 101(b)(1)(F)

(TL:VISA-41; 01-15-1991)

a. Sec. 315 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, amended the INA 101(b)(1)(D) by providing for an offspring born out of wedlock to be considered a "child" of the natural father for immigration purposes. The amendment produced results which had not been intended or anticipated by Congress. Prior to the IRCA amendment, the existence of a father who had not legitimated his child was irrelevant to a determination as to whether a mother could release her child for adoption. However, the language in INA 101(b)(1)(D), as amended, precluded a child from being released by the mother if the natural father had established at any time a parent-child relationship with the child.

b. Section 210(a) of Pub. L. 100-459 removed the constraint created by passage of the previous law by adding new language to the term "parent" in INA 101(b)(2). In order to provide relief under the provisions of INA 101(b)(1)(F), for the purposes of that section only, the language excludes from the term "parent" the natural father of an illegitimate child, as described in INA 101(b)(1)(D), if the natural father has abandoned or deserted the child, or irrevocably released the child. The exception in INA 101(b)(2) was made permanent by section 611 of Pub. L. 101-162. [See 9 FAM 40.1 N6 below.]

9 FAM 40.1 N3 Parent Defined

(TL:VISA-128; 10-20-1995)

The term "parent," "father," or "mother" means a parent, father, or mother only where the relationship exists by reason of any of the circumstances listed in INA 101(b)(1), except as noted in 9 FAM 40.1 N2.4-3 above.

9 FAM 40.1 N4 Immigration Benefits

9 FAM 40.1 N4.1 Natural Parents/Siblings of Adopted Child

(TL:VISA-307; 08-20-2001)

An adopted child (as defined in INA 101(b)(1)(E)) may not confer immigration benefits upon a natural parent or sibling unless such adoption has been legally terminated. [See Interim Decision 3244, Matter of Li.] This is true even where the child never received an immigration benefit based on the adoption.

9 FAM 40.1 N4.1-1 When Adoption has been Terminated

(TL:VISA-307; 08-20-2001)

The Board of Immigration Appeals [Matter of Li] has determined that a natural parent/child or sibling relationship can be again recognized for immigration purposes following the termination of an adoption, if the petitioner can demonstrate that:

(1) No immigration benefit was obtained or conferred as a result of the adoptive parent;

(2) A natural parent/child relationship meeting the requirements of INA 101(b) once existed;

(3) Any subsequent adoption that satisfied the requirements of INA 101(b)(1)(E) has been lawfully terminated; and

(4) The petitioner's natural relationship with the beneficiary has been reestablished, either through operation of law or through other legal process.

9 FAM 40.1 N4.2 Immigration Benefit Conferred from Child to Father

(TL:VISA 128; 10-20-1995)

The Immigration and Naturalization Service has determined that an illegitimate child may confer immigration benefits to a father if:

(1) The father has established that he is the natural parent; and

(2) A bona fide parent-child relationship has been in existence prior to the child's 21st birthday. [See 9 FAM 40.1 N2.3-3 above.]

9 FAM 40.1 N5 Son or Daughter Defined

(TL:VISA-128; 10-20-1995)

The INA defines “son” or “daughter” as someone who has at any time met the definition of child in INA 101(b)(1).

9 FAM 40.1 N5.1 Illegitimate Child of Mother

(TL:VISA-128; 10-20-1995)

An alien who was born out of wedlock who is the son or daughter of a U.S. citizen or lawful permanent resident mother is deemed to be a “son” or “daughter” within the meaning of INA 203(a)(1), (2) or (*3*), provided the son or daughter has met the definition of INA 101(b)(1)(D).

9 FAM 40.1 N5.2 Illegitimate Child of Father

(TL:VISA-41; 01-15-1991)

An alien who was born out of wedlock and is the son or daughter of a U.S. citizen or lawful permanent resident father is a “son” or “daughter” within the meaning of INA 203(a)(1). The amended provisions of INA 101(b)(1)(D) which entered into effect on November 6, 1986, are retroactive to the extent that a parent-child relationship established prior to the effective date can be used as the basis for a petition filed after that date.

9 FAM 40.1 N5.3 Stepson or Stepdaughter

(TL:VISA-128; 10-20-1995)

A stepson or stepdaughter is not a “son” or “daughter” within the meaning of INA 203(a)(1), (2), or (3) and is not eligible for preference status unless, at the time the relationship was established, the stepchild *had* not reached the age of 18 as required by INA 101(b)(1)(B).

9 FAM 40.1 N6 Brother and Sister Defined

(TL:VISA-128; 08-20-1995)

Brothers and sisters of the same mother and father, although born out of wedlock and legitimated, are “brothers” or “sisters” within the meaning of INA 203(a)(4) and are eligible for preference under these provisions.

9 FAM 40.1 N6.1 Brothers or Sisters of Half Blood With Same Mother

(TL:VISA-128; 10-20-1995)

Brothers or sisters who have the same mother but different fathers, including those born out of wedlock and not legitimated, are “brothers” or “sisters” within the meaning of INA 203(a)(4) and are eligible for preference status under this provision.

9 FAM 40.1 N6.2 Brothers or Sisters of Half Blood With Same Father

(TL:VISA-162; 02-24-1997)

Brothers or sisters of half blood who have the same father but different mothers are eligible for preference under INA 203(a)(4) if both the petitioner and beneficiary sibling qualified as a child under INA 101(b)(1).

9 FAM 40.1 N6.3 Stepbrother or Stepsister

(TL:VISA-128; 10-20-1995)

A stepbrother or stepsister is not a " brother" or " sister" within the meaning of INA 203(a)(4) unless, at the time the relationship was established, the stepchild, or children if both became stepchildren, were under the age of 18 according to the of INA 101(b)(1)(B). If a consular officer at a post authorized to approve petitions receives a petition involving a stepbrother-stepsister relationship where one child was under the age of 18 at the time the marriage creating the stepchild relationship occurred, but the stepbrother or stepsister was above the age of 18, the petition should be referred to INS for consideration as one which is not clearly approvable. [See 9 FAM 42.41 N3.2.]

9 FAM 40.1 N6.4 Adoptive Sister or Brother

(TL:VISA-128; 10-20-1995)

Pursuant to a Board of Immigration Appeals decision, the INS has held, that an adoptive brother or sister of a U.S. citizen who is at least 21 years of age is eligible for preference status under INA 203(a)(4*)* if the adoptive sibling qualifies under INA 101(b)(1)(E).

9 FAM 40.1 N7 Basis for "Following to Join"

9 FAM 40.1 N7.1 General

(TL:VISA-162; 02-24-1997)

The term “following to join” permits an alien to obtain the (NIV or IV) status of the principal alien as long as the alien following to join possesses the required spouse or child relationship with the principal alien. There is no statutory time period during which the following-to-join alien must apply for a visa and seek admission into the United States. The only time sensitive factor to qualify as a spouse or child following to join is the alien’s continued relationship with the principal alien. As an example, a person would no longer qualify as a child “following to join” upon reaching the age of 21 years or by entering into a marriage. Furthermore, there is no requirement that the following-to-join alien must take up residence with the principal alien in order to qualify for the visa, as the child or spouse is merely following the principal alien to the United States. [See also 9 FAM 42.42 N8.]

9 FAM 40.1 N7.2 Spouse or Child Acquired Prior to Admission of Principal Alien

(TL:VISA-41; 01-15-1991)

A spouse or child acquired prior to a principal alien’s admission to the United States is entitled to the priority date of the principal alien, regardless of the period of time which may elapse between the issuance of a visa to or admission into the United States of the principal alien and the issuance of a visa to the spouse or child of such alien and regardless of whether the spouse or child had been named in the immigrant visa application of the principal alien.

9 FAM 40.1 N7.2-2 Child Born After Admission of Principal Alien

(TL:VISA-128; 10-20-1995)

A child born of a marriage which existed at the time of the principal alien’s admission to the United States is considered to have been acquired prior to the principal alien’s admission under the provisions of 22 CFR 42.53(d) and, thus, entitled to the principal alien’s priority date.

9 FAM 40.1 N7.2-3 Spouse or Child Acquired Subsequent to Admission of Principal Alien

(TL:VISA-128; 10-20-1995)

A spouse or child acquired through a marriage which occurs after the admission of the principal alien under INA 101(a)(27)(C) or INA 203(a) through (c) is not derivatively entitled to the status accorded by those provisions.

9 FAM 40.1 N7.2-4 Adopted Child

(TL:VISA-41; 01-15-1991)

A child who qualified as a "child" under the provisions of INA 101(b)(1)(E) subsequent to the principal alien's admission, but was adopted and was a member of the principal alien's household prior to the adoptive parent's admission to the United States, is considered to have been acquired prior to the principal alien's admission.

9 FAM 40.1 N8 Foreign State Chargeability Obtained From Derivative Beneficiary

(TL:VISA-128; 10-20-1995)

a. An immigrant visa applicant may derive a more favorable foreign state chargeability from an accompanying alien spouse under INA 202(b)(2) and, at the same time, the spouse may derive preference status from the principal applicant. For instance, the beneficiary of a fourth preference petition, who was born in Mexico for which no fourth preference numbers are available and who is accompanied to the United States by his wife who was born in a third country, may be issued a fourth preference visa chargeable to his wife's country of nationality if fourth preference numbers are readily available. By the same token, if no other visa is immediately available to her, the wife of such alien may acquire fourth preference status based on the husband's fourth preference status. In such cases both the husband and wife, in a sense, are principal aliens. The husband is the principal alien for the purpose of conferring a preference status and the wife is the principal alien for the purpose of conferring a more favorable foreign state chargeability.

b. The principles described in the paragraph above may apply in a case where one spouse benefits from the provisions of INA 212(g), while the other spouse may benefit, through the afflicted alien, from a more favorable foreign state chargeability, or special immigrant or preference immigrant status.

c. Since neither party is allowed to precede the other spouse and both spouses must apply together for admission into the United States, the consular officer shall issue the visas simultaneously to the husband and wife.

9 FAM 40.1 N9 Aggravated Felony Defined

(TL:VISA-162; 02-24-1997)

a. Pub. L. 101-649 was signed into law on November 29, 1990. The law addresses the definition of the term "aggravated felony" in INA 101(a)(43). The changes apply to all offenses committed on or after November 29, 1990, except for the language addressing illicit trafficking in any controlled substances and the proviso relating to offenses"...in violation of federal or state law "or"...in violation of foreign law."

b. Pub. L. 103-416 greatly expanded the list of offenses and was applicable to convictions entered on or after October 25, 1994.

c. Pub. L. 104-208 further expanded the list of offenses and made it clear that the new definition applies to offenses which occurred before, on, or after the date of the law's enactment.

d. An aggravated felony offenses include:

(1) Murder, rape or sexual abuse of a minor;

(2) Illicit trafficking in any controlled substance;

(3) Illicit trafficking in any firearms, destructive devices, or explosive material;

(4) Money laundering or engagement in monetary transaction in property derived from specified unlawful activity if the amount of funds exceeds $10,000;

(5) Certain offenses relating to explosive materials or firearms;

(6) Crimes of violence (not including purely political offenses*)* in violation of Federal or State law (or attempt or conspiracy to commit such act) for which a term of imprisonment was at least 1 year; and

(7) Theft and burglary (including receipt of stolen property) for which a term of imprisonment *was* at least 1 year;

(8) Demand for or receipt of ransom;

(9) Child pornography;

(10) Offenses relating to racketeer influenced corrupt organizations for which a sentence of 1 or more years is imposed;

(11) Offenses relating to controlling, managing, or supervising of the prostitution business, if committed for commercial advantage;

(12) Offenses relating to peonage, slavery or involuntary servitude;

(13) Offenses relating to disclosure of classified information, sabotage or treason;

(14) Offenses relating to the protecting the identity of undercover agents;

(15) Fraud or deceit resulting in loss exceeding $10,000;

(16) Tax evasion in which revenue loss exceeds $10,000;

(17) Alien smuggling for commercial advantage, except a first offense involving the alien's spouse, child or parent, [see also 9 FAM 40.65 Notes];

(18) Document fraud, except a first offense involving the alien's spouse, child or parent, for which the term of imprisonment is at least 12 months;

(19) Defendant's failure to appear for service of sentence if offense is punishable by imprisonment of more than 5 years;

(20) Commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers if imprisonment was for at least 1 year;

(21) Obstruction of justice, perjury or subornation of perjury, or bribery of a witness if offense is punishable by imprisonment of more than 5 years;

(22) Failure to appear before a court to answer to or dispose of a charge of felony if offense is punishable by imprisonment of more than 2 years;

(23) Attempt or conspiracy to commit an offense in violation of Federal or State law or violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.

e. See also 9 FAM 40.91(d) Notes.

9 FAM 40.1 N10 "Actually Imposed" Defined

(TL:VISA-162; 02-24-1997)

The phrase "actually imposed" refers to the actual length of the sentence meted out by the court and not the period of imprisonment actually served.

9 FAM 40.1 N11 "Conviction" Defined

(TL:VISA-162; 02-24-1997)

INA 101(A)(48) defines "conviction" as:

(1) A formal judgment of guilt entered by a court; or

(2) A finding of guilty by judge or jury;

(3) A plea of guilty or *nolo contendere* by the alien;

(4) An admission of sufficient facts to warrant a finding of guilt; or

(5) The imposition of some form of punishment, penalty or restraint of liberty by a judge.